

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PETER NELSON, )  
)  
Employee, )  
Claimant, ) INTERLOCUTORY  
) DECISION AND ORDER  
v. )  
) AWCB Case No. 201509876  
STATE OF ALASKA, )  
) AWCB Decision No. 21-0092  
Self-insured Employer, )  
Defendant. ) Filed with AWCB Anchorage, Alaska  
) on September 27, 2021.  
)  
\_\_\_\_\_ )

Peter Nelson's May 7, 2021 petition for a Second Independent Medical Evaluation (SIME) was heard in Anchorage, Alaska on August 11, 2021, a date selected on June 22, 2021. A May 27, 2021 hearing request gave rise to this hearing. Attorney Keenan Powell appeared and represented Peter Nelson (Employee). Attorney Henry Tashjian appeared and represented the State of Alaska, Department of Military and Veterans Affairs (Employer). Employee appeared and testified on his own behalf. The record closed at the hearing's conclusion on August 11, 2021. The record was reopened on the board's own motion for the receipt of the parties' August 27, 2021 stipulation to the compensability of the surgery recommended by Dr. Eule to repair Employee's C6-7 pseudoarthrosis. The record closed on August 27, 2021.

## ISSUES

Employee contends there are significant disputes between his attending physicians and Employer's medical evaluator (EME) regarding causation and treatment of his C3-4 stenosis. He requests an SIME be ordered with an orthopedic surgeon.

Employer contends Employee's physicians have not opined the C3-4 degeneration was caused by the work injury. Therefore, it contends there are no disputes between Employee's treating physicians and the EME physician to warrant an SIME.

**1) Should an SIME on the causation, compensability, and the need for medical treatment of Employee's C3-4 stenosis be ordered?**

Employee's counsel contends she is entitled to an award of full fees for prosecuting the SIME issue and prevailing over Employer's resistance.

Employer contends attorney fees and costs are not warranted even if the panel were to grant the SIME petition, as an SIME is not a benefit, nor is it compensation, as required by AS 23.30.145(a). Employer further contends AS 23.30.145(b) fees may only be awarded upon successful prosecution of the claim, and Employee's claim is not an issue in this SIME petition.

**2) Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On June 26, 2015, Employee filed his Report of Injury (ROI) stating he injured his neck at work on June 22, 2015, while reaching overhead and working on a powered door opener. He specifically described, when he turned his head in an awkward position with his arms overhead, he experienced a burning pain in his neck, which then went down by his left shoulder blade and the back of his left arm, hand, and fingers. (ROI, June 26, 2015).
- 2) After the work injury, Employee participated in conservative therapy with chiropractic treatment sessions with chiropractor David Richey, D.C., for his ongoing neck pain, cervical muscle spasms, upper back pain, and pain in the left arm and right forearm. (DC Richey reports, June 25, 2015 to May 2, 2016. (DC Richey clinic reports, June 15, 2015 to May 2, 2016).
- 3) On July 6, 2015, on referral from DC Richey, Employee saw physiatrist Michel Gevaert, M.D., of Alaska Spine Institute for his ongoing neck pain and burning sensation in his left arm. Dr. Gevaert reviewed the July 1, 2015 cervical magnetic resonance imaging (MRI) study and noted there was degenerative disc disease and osteophyte formation at C5-6 and C6-7 as well as

foraminal stenosis on the left at C3-4 and on the right at C4-5. Dr. Gevaert recommended Employee continue with conservative therapy. (Gevaert clinic note, July 6, 2015).

4) On October 20, 2015, on referral from nurse practitioner Shawna Wilson, ANP of Alaska Spine Institute, orthopedic surgeon James Eule, M.D. evaluated Employee for his significant incapacitating neck pain, bilateral arm pain, left worse than right. Dr. Eule reviewed the July 1, 2015 cervical spine MRI which showed degenerative changes at C5-6 and C6-7, as well as significant foraminal stenosis and perhaps central stenosis at C5-6 with spinal cord compression. Dr. Eule ordered a computed tomography (CT) myelogram to more clearly delineate whether there was central stenosis. (Eule clinic note, October 20, 2015).

5) On November 10, 2015, Employee followed up with Dr. Eule on the October 26, 2015 cervical CT myelogram, which demonstrated the most severe changes at C5-6 and C6-7. At C5-6 there was severe foraminal stenosis on the right with more moderate narrowing of the neural foramen on the left, and at C6-7, there was foraminal stenosis, more notable on the right than on the left. There was also significant left foraminal stenosis at C3-4. Dr. Eule opined Employee had failed conservative therapy and surgical treatment was necessary. The plan was to proceed with an anterior cervical discectomy and fusion at both C5-6 and C6-7. (Eule clinic note, November 10, 2015).

6) On December 19, 2015, orthopedic surgeon Charles Craven, M.D., performed an Employer's Medical Examination (EME) and opined the cause for Employee's symptoms and need for medical treatment, including the C5-7 two-level cervical fusion surgery, was his significant pre-existing multilevel degenerative cervical spondylosis. Dr. Craven opined Employee was medically stable as of July 24, 2015, and had no ratable permanent impairment as a result of the June 22, 2015 work injury. (Craven EME report, December 19, 2015).

7) On January 6, 2016, Employer controverted medical treatment after December 19, 2015, based on Dr. Craven's EME report, including temporary partial disability (TPD), permanent total disability (PTD), permanent partial impairment (PPI), and reemployment benefits related to the degenerative cervical spondylosis. (Controversion, January 6, 2016).

8) On February 3, 2016, Employee filed a claim for TTD, TPD, PPI, medical and transportation costs, penalty, interest, and attorney fees. (Workers' Compensation Claim (WCC), August 18, 2016).

- 9) On February 3, 2016, Employee a petition for a second independent medical examination (SIME). (Employee's WCC and petition, February 3, 2016).
- 10) On March 1, 2016, the parties stipulated to an SIME. (Prehearing conference (PHC) summary, March 1, 2016).
- 11) On August 18, 2016, Employee was examined by orthopedic surgeon Jon Scarpino, M.D., in an SIME. Dr. Scarpino reviewed Employee's medical records, including imaging studies, and conducted a physical examination. He opined the June 22, 2015 work injury was the substantial cause of Employee's disability and need for medical treatment, including surgical decompression and fusion of C5-7. He stated Employee was not medically stable. (SIME report, August 18, 2016).
- 12) On October 14, 2016, Employer withdrew its January 5, 2016 controversion, which was based on Dr. Craven's December 19, 2015 EME report. (October 14, 2016 letter from Employer).
- 13) On November 28, 2016, orthopedic surgeon James Eule, M.D., performed anterior cervical discectomy/decompression, interbody fusion and cage placement at C5-6 and C6-7, as well as anterior plating, C5-7. Bone grafting was also done using local autograft. (Operative report, November 28, 2016).
- 14) On February 24, 2017, physician's assistant James Glenn of Orthopedic Physicians Alaska saw Employee for a post operative visit and released him to work full time, which Employee was eager to do. Employee was also referred for physical therapy. (Clinic note, February 24, 2017).
- 15) From June 2017 through March 29, 2021, Employee was followed by orthopedic surgeon Larry Levine, M.D., of Alaska Spine Institute for evaluation and pain management. (Clinic notes, Alaska Spine Institute, June 26, 2017 through March 29, 2021).
- 16) On September 25, 2018, Dr. Gevaert performed electrodiagnostic testing to evaluate Employee's upper extremity paresthesias. The results of the testing showed the right C6 myotome was significant for reduced recruitment and increased polyphasics, and the left C7 myotome was significant for reduced recruitment and increased polyphasics as well. Dr. Gevaert diagnosed Employee with moderate to severe cubital tunnel syndrome, right greater than left based on the nerve conduction study. He also diagnosed Employee with mild chronic right C6 radiculopathy and mild left C7 radiculopathy. (Gevaert clinic note, September 25, 2018).

17) On February 12, 2019, orthopedic surgeon R. David Bauer, M.D., examined Employee and reviewed his medical records in an EME. Dr. Bauer opined Employee had been medically stable since December 28, 2017, and his ongoing neck pain complaints and bilateral cubital tunnel syndrome were unrelated to the work injury. (EME report, February 12, 2019).

18) On December 9, 2020, Dr. Levine evaluated Employee and noted he had not benefited from the prior epidural steroid injection he had received and his multimodal pain treatment, including Percocet, was no longer effective. Employee reported his pain was continuing to escalate and he had lost cervical spine mobility due to the pain. Given the changes, Dr. Levine opined Employee might need to have stabilization surgery at the levels above the fusion. He planned to refer Employee to Dr. Eule. (Clinic note, December 9, 2020).

19) On December 22, 2020, on referral from Dr. Levine, Dr. Eule evaluated Employee for his worsening neck pain and left arm symptoms. Dr. Eule opined in the four years since the C5-7 fusion, the C3-4 and C4-5 levels had progressed to causing significant spinal cord compression. Employee also complained he felt his balance and coordination was getting a little bit worse, and he had a lot of headaches. Employee stated his myofascial massage two times a week was the only thing keeping him from feeling miserable all the time. Dr. Eule ordered a CT myelogram to obtain a clearer picture than the MRI had provided. (Eule clinic note, December 22, 2020).

20) On December 31, 2020, on referral from Dr. Eule, Employee underwent a cervical spine myelographic contrast-enhanced computed tomography (CT). Radiologist Robert Bridges, M.D., compared the results with the results to a prior study performed on October 26, 2015. He found there was severe central canal stenosis at C3-4 secondary to disc protrusion and uncinata hypertrophy, which represented incremental progression, particularly for the disc protrusion, since the previous study. There was also moderate left neural foraminal encroachment at C3-4, increased over the previous examination. Dr. Bridges also found there was lack of bony union of the anterior interbody fusion at C6-7, with mature incorporation at C5-6. (CT myelogram report, December 31, 2020).

21) On January 8, 2021, Dr. Eule saw Employee to follow up after the CT myelogram. Dr. Eule noted the CT myelogram showed severe cervical spinal stenosis with spinal cord compression at C3-4, as well as pseudoarthrosis at C6-7 with beginning recurrent right foraminal stenosis. Dr. Eule reviewed the CT myelogram with Employee and explained his continued chronic pain was due to the pseudoarthrosis at the C6-7 level, which needed to be fixed. He recommended a disc

arthroplasty at the C3-4 level, as doing a fusion at C3-4 and coursing that in between his two fusions at the C4-5 level would probably fall apart in a short time. In addition, with maintaining some motion at the C3-4 level, the C4-5 level would last much longer. Dr. Eule planned to perform a C3-4 arthroplasty and a C6-7 revision fusion. Employee agreed with this plan. (Eule clinic note, January 8, 2021).

22) On January 29, 2021, Employee filed a claim for temporary total disability (TTD), permanent partial impairment (PPI), medical benefits, transportation benefits, penalty, interest, unfair/frivolous controversion, and attorney fees. (WCC, January 20, 2021).

23) On February 3, 2021, Dr. Levine examined Employee, who had been complaining of increased levels of cervical spine pain and loss of all cervical spine mobility due to pain. Dr. Levine reviewed Employee's May 8, 2020 cervical spine magnetic resonance imaging (MRI) study as well as the December 28, 2021 CT myelogram. Dr. Levine noted the major finding was of significant degenerative changes at C3-4, two levels above the C5-7 fusion mass. There was marked osteophyte formation posteriorly and significant disc protrusion to the left. Dr. Levine noted these changes could explain much of Employee's symptomatology. He stated the pseudoarticulation was a failure of the actual fusion site itself. Dr. Levine also opined Employee's prior fusion made him much more likely to have failure above and below the level of fusion. He reviewed with Employee that there are more rapid failures above and below the fusion level, so it was not unexpected his prior work injury that caused the need for fusion had contributed to the degenerative changes at the levels above and below the fusion that now needed to be addressed. (Clinic note, February 3, 2021).

24) On April 27, 2021, Employee attended an EME performed by orthopedic surgeon R. David Bauer, M.D. Dr. Bauer reviewed Employee's medical records, imaging studies, and conducted a physical examination. Dr. Bauer opined the progression of degeneration, especially at C3-4, was due to degenerative disc disease, and not "adjacent segment degeneration." He stated the predominant worsening of the cervical spine had occurred at about the same rate between C4-5 and C3-4. In addition, he stated adjacent segment degeneration affects only the adjacent level, and C3-4 is two levels above the prior surgery at C5-7. Dr. Bauer also stated high cervical radiculopathy at C3-4 is relatively rare. Further, patients with radiculopathy usually present with unilateral pain particularly in the trapezial, parascapular, medial clavicular area, or even with suboccipital headaches. He opined the substantial cause of the numbness and dysesthesia in

Employee's hands and fingers, was not the work injury, and was not due to adjacent segment degeneration, but was due to advancing age. Dr. Bauer stated Employee did not have clinical symptoms attributable to the degenerative disc disease at C3-4. Further, he stated if the surgery at C3-4 recommended by Dr. Eule was medically necessary, it was not "directly" due to the 2015 work injury or subsequent treatment. (Bauer EME report, April 27, 2021).

25) On May 7, 2021, Employee filed his petition for an SIME. (SIME Petition, May 7, 2021).

26) On June 23, 2021, Employer filed its controversion of all benefits related to the treatment of the neck except for the treatment of the incomplete C6-7 fusion. Employer also controverted all benefits related to the treatment of bilateral upper extremities including bilateral cubital tunnel syndrome. The controversion was based on Dr. Bauer's February 12, 2019 and April 27, 2021 EME reports. (Controversion, June 23, 2021).

27) On August 4, 2021, Employee's attorney filed her affidavit of attorney fees and costs documenting 9.0 hours of work on Employee's May 7, 2021 SIME petition. She billed \$400 per hour for a total of \$3,600 in services and no costs. She noted her many years of experience as an attorney since being admitted to the Alaska Bar Association in 1983, including personal injury cases, criminal defense cases, and family law cases. Starting in 2005, she began to concentrate on workers' compensation cases. Employee's attorney also stated she has been awarded \$400 per hour in several cases since 2016. (Powell affidavit, August 4, 2021).

28) Employee's attorney was recently awarded attorney fees based on an hourly rate of \$400.00. (*Meili v. Sterling Assisted Living*, AWCB Decision No. 20-0030 (May 15, 2020); *Guerrissi v. State*, AWCB Decision No. 20-0013 (March 16, 2020)).

29) Employee testified Dr. Eule had told him it would be much better, and he would prefer, to repair the C6-7 pseudoarthrosis and the C3-4 disc arthroplasty in one surgery. (Hearing record).

30) On August 27, 2021, the parties filed their stipulation to the compensability of the surgery recommended by Dr. Eule to repair Employee's C6-7 pseudoarthrosis.

#### PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

**AS 23.30.095. Medical treatments, services, and examinations.**

....

(k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. ...

AS 23.30 095(k) is procedural, not substantive. *Deal v. Municipality of Anchorage*, AWCBC Decision No. 97-0165 (July 23, 1997) at 3. Wide discretion exists under AS 23.30.095(k) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties." *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), addressed authority to order an SIME under AS 23.30.095(k) and AS 23.30 110(g). *Bah* used "SIME" to apply to evaluations ordered under both sections. With regard to AS 23.30.095(k), the Commission cited *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8, in which it confirmed:

[t]he statute clearly conditions the Employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the Employee and the Employer.

*Bah* further stated in *dicta*, before ordering an SIME it is necessary for the board to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Bah* at 4. *Bah* noted the purpose of ordering an SIME is to assist the board, and it is not intended to give employees an additional medical opinion at the employers' expense when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between an employee's physician and an EME?

2) Is the dispute significant? and



3) Will an SIME physician’s opinion assist the board in resolving the disputes?

*Deal*, AWCB Decision No. 97-0165 (July 23, 1997), at 3.

**AS 23.30.110. Procedure on claims.**

(g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. . . .

. . . .

*Tobar v. Remington Holdings, LP*, 447 P.3d 747, 757 (Alaska 2019) held the Act authorizes the board to order an SIME when requested under AS 23.30.095(k) and AS 23.30.110(g), and 8 AAC 45.092(g) allows it to order one on its own motion. *Tobar* cited with approval from the commission’s *Bah* decision, which said the board can order an SIME “when there is a significant gap in the medical or scientific evidence” and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue.

**AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties . . . .

*In Fred Meyer, Inc. v. Updike*, AWCAC Decision No. 120 (October 29, 2009), the employee had waived her right to all benefits through settlement, with the exception of future medical care. A dispute arose about medical care and the board, on its own motion, ordered an SIME under AS 23.30.110(g). The commission held the board erred in ordering an SIME under AS 23.30.110(g) because the employee claimed only medical benefits rather than “compensation.” *Updike* held AS 23.30.095(k) provided proper authority to order an SIME when medical benefits alone are claimed so long as there is a qualifying medical dispute.

**AS 23.30.145. Attorney fees.**

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that

the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

**AS 23.30.155. Payment of compensation.**

....

(h) The board may upon its own initiative at any time in a case ... where right to compensation is controverted . . . make investigations, cause the medical examinations to be made. . . and take further action which it considers will properly protect the rights of all parties.

**8 AAC 45.180. Costs and attorney's fees.**

....

(b)A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of a claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee....

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a “contingency factor” in awarding fees to employees’ attorneys in workers’ compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id.* at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id.* at 973, 975. In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the court stated the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held when attorneys perform their own paralegal work, they must be paid at the rate of an attorney. *Rusch* also held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). “In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed.” *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer “resists” payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* The board has awarded attorney fees in cases where an employer unsuccessfully resisted an SIME. *See, e.g., Stepanoff v. Bristol Bay Native Corp.*, AWCBC Decision No. 09-0041 (February 26, 2009); *Gillion v. The Northwest International et al*, AWCAC Dec. 253 (August 28, 2018). Fees are also awarded when an employee is successful in reemployment cases because the preservation of reemployment benefits over the employer’s resistance, is a benefit. *Carroll v. City of Fort Yukon*, Dec. 12-0176 (October 8, 2012); and *Bruketta v. Encore Mechanical, Inc.*, Dec. 19-0096 (September 23, 2019).

ANALYSIS

**1) Should an SIME on the causation, compensability, and the need for medical treatment of Employee's C3-4 stenosis be ordered?**

Employer has accepted the compensability and need for the surgery recommended by Dr. Eule to repair Employee's C6-7 pseudoarthrosis, and the parties have filed a stipulation to that effect. However, the parties disagree concerning whether the C5-7 fusion to treat the work injury is the cause of Employee's symptoms and need for medical treatment for his C3-4 central stenosis. They also disagree whether there are significant disputes between Employee's attending physicians and EME physician Dr. Bauer.

This is a preliminary, procedural hearing on Employee's petition requesting an SIME. *Deal*. There are generally three requirements before an SIME can be ordered under AS 23.30.095(k), although they are not required by the statute. *Bah*. First, there must be a medical dispute between an employee's attending physician and an EME physician. Second, the dispute must be significant. Third, it must be determined an SIME physician's opinion would assist in resolving the dispute. *Bah; Smith*.

The first consideration is whether there is a medical dispute. Here, the record does include disagreement between Employee's treating physicians Drs. Levine and Eule and EME physician Dr. Bauer on the causation and compensability of Employee's symptoms and need for medical treatment due to his C3-4 stenosis. Dr. Levine opined the C5-7 fusion performed to treat Employee's work injury made it much more likely to have failure below and above the fusion, as seen at C3-4, which now had a significant osteophyte complex, neuroforaminal encroachment and central stenosis. He stated unfortunately one begins to see more rapid failures above and below the fusion level, so it was not unexpected that his prior work injury that caused the need for the C5-7 fusion had contributed to the degenerative changes at the levels above and below the fusion that now needs to be addressed. He also opined, since more conservative treatment such as steroid injections and pain medications were not effective in controlling the pain, surgical treatment might be required. Dr. Eule opined Employee's severe central spinal stenosis with spinal cord compression at C3-4 required a disc arthroplasty to maintain some mobility at that

level, as fusion at that level would probably cause the C4-5 level to also require fusion in a short period of time. On the other hand, EME physician Dr. Bauer opined adjacent segment degeneration affects only the adjacent level, and C3-4 is two levels above the prior surgery at C5-7, so the fusion to treat the work injury was not the cause of the changes at the C3-4 level. He opined the substantial cause of the cubital tunnel syndrome, which was causing the numbness and dysesthesia in Employee's hands and fingers was not the work injury, and not due to adjacent segment degeneration, but was due to advancing age. Dr. Bauer stated Employee did not have clinical symptoms attributable to the degenerative disc disease at C3-4. Further, he stated if the surgery at C3-4 recommended by Dr. Eule was medically necessary, it was not directly due to the 2015 work injury or subsequent treatment. Since there is a medical dispute between Employee's attending physicians and the EME physician, the first prong of the test for an SIME is met.

The second prong is whether the dispute is "significant." Ongoing pain symptoms and need for medical treatment cannot be considered insignificant issues. Employee is claiming TTD, PPI, medical benefits, and transportation costs as well as attorney fees and costs. These are valuable and significant benefits if compensable. *Updike*. Moreover, the dispute between Employee's attending physicians and the EME physician is significant since Employee's entitlement to benefits first depends on the compensability of the treatment. The causation and treatment disputes are significant and justify an SIME. *Bah*.

The third factor is whether an SIME will be helpful to resolve the disputes. This case involves complex medical issues and significant medical disputes between Employee's attending physicians Drs. Levine and Eule on one hand, and EME physician Dr. Bauer on the other, regarding causation and the need for medical treatment. An SIME with an orthopedic surgeon will assist in best ascertaining the parties' rights and to resolve the parties' disputes. *Bah*; AS 23.30.135.

Because orthopedic surgeon Dr. Scarpino has previously evaluated Employee in an SIME for his C5-7 disability and need for medical treatment, he is familiar with Employee's case and is the

best choice to perform the SIME. Therefore, an SIME with Dr. Scarpino will be ordered. AS 23.30.135; *Rogers & Babler*.

**2) Is Employee entitled to attorney's fees and costs?**

Employee is requesting attorney fees. AS 23.30.145; 8 AAC 45.180. Where Employee has successfully prosecuted a claim or obtained a benefit, an award of attorney fees is permitted. AS 23.30.145. Although this order is interlocutory, Employee's attorney successfully obtained an order for an SIME. Employer contends Employee is not entitled to attorney fees as an SIME is neither a benefit nor compensation. Employer further contends any benefit or detriment to the Employee resulting from an SIME cannot be realized until a hearing on the merits or other action affecting the Employee's receipt of past and future benefits. However, the board routinely awards attorney fees where an employee is successful in obtaining an order for an SIME over Employer's objection. *Stepanoff; Gillion*. In her successful petition for an SIME, Employee's attorney expended 9 hours of time, including the time spent in performing her own paralegal work. When attorneys perform their own paralegal work, she or he must be paid at the rate of an attorney. *Rusch*.

In addition to reviewing the work done, *Rusch* requires the Board to look at the eight factors in Alaska Rule of Professional Conduct 1.5(a) in determining a reasonable fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly:

SIME petitions are not exceptionally difficult, and do not require an unusually high level of skill to perform. Employee's brief was very helpful to the board.

2. The likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer:

To some extent, time spent working on any client's case prevents an attorney from spending that time on another client's case. However, in her affidavit, Employee's attorney did not state the work for Employee precluded her from other employment.

3. The fee customarily charged in the locality for similar services:

In her affidavit, Employee's attorney stated she was requesting \$400.00 per hour, including for time she spent performing her own paralegal work "pursuant to *Rusch*." Neither party provided any evidence as to the hourly rate customarily awarded to employee attorneys in workers' compensation cases in Anchorage. Employee's attorney has previously been awarded \$400.00 per hour in numerous cases and on appeal. Her attorney fees are reasonable. *Rogers & Babler*.

4. The amount involved and the results obtained:

Employee's attorney was successful in obtaining an SIME on Employee's C3-4 disability and need for medical treatment.

5. The time limitations imposed by the client or by the circumstances:

In her affidavit, Employee's attorney did not identify any unusual time limitation imposed by the client or the circumstances, although of course the time spent on Employee's case precludes using that time on another case.

6. The nature and length of the professional relationship with the client.

Employee's attorney has represented him since February 3, 2016. This factor may favor either an increased fee or a decreased fee, depending on the fact of a particular case. In this case neither party has explained how the length of the professional relationship would affect the fee.

7. The experience, reputation and ability of the lawyer or lawyers performing the services:

Employee's attorney has practiced law in Alaska since 1983; she is one of the more experienced workers' compensation attorneys and has significant experience in other areas including litigation.

8. Whether the fee is fixed or contingent:

Virtually all fees for employee attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate.

Employee is entitled to payment of reasonable attorney fees for nine hours at \$400.00 per hour,

or \$3,600.00. In light of the time expended, and the results obtained, this is a reasonable, fully compensatory amount.

CONCLUSIONS OF LAW

1. Employee's petition for an SIME on the causation, compensability and medical treatment of Employee's C3-4 stenosis should be granted.
2. Employee is entitled to an award of attorney fees in the amount of \$3,600.00.

ORDERS

- 1) Employee's May 7, 2021, petition is granted.
- 2) An SIME with orthopedic surgeon Jon Scarpino, M.D., shall be ordered on the causation, compensability, and medical treatment of Employee's C3-4 stenosis.
- 3) Employer shall pay \$3,600.00 in attorney fees.

Dated in Anchorage, Alaska on September 27, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/  
Judith A DeMarsh, Designated Chair

/s/  
Sara Faulkner, Member

/s/  
Nancy Shaw, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the



reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of PETER NELSON, employee / claimant v. STATE OF ALASKA, self-insured employer/ defendant; Case No. 201509876; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 27, 2021.

\_\_\_\_\_/s/\_\_\_\_\_/\_\_\_\_\_  
Kim Weaver, Office Assistant